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No. 00-254

Supreme Court, U.S.
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In The

Supreme Court of the United States

DON SUNDQUIST, Governor of Tennessee, et al.,

Petitioners,

v.

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the decision of the court below that Plan A for the state house of representatives enacted by the Tennessee legislature in 1994 violated Section 2 of the Voting Rights Act was clearly erroneous?

2. Whether the issue sought to be raised in the petition for writ of certiorari is moot?

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ARGUMENT

I. Introduction

The evidence of minority vote dilution in this case was, in the words of the court of appeals, "simply overwhelm[ing]." Pet. App. 20a. The remedy, moreover, did not achieve proportionality for black voters in Rural West Tennessee, let alone maximize their voting strength. As the district court concluded:

> the requirement of a majority-black district in that area, which would make only 20% of the House districts in that area majority-black, ought not be viewed as an improper attempt to maximize majority-minority districts, but as a minimal requirement for the political equality of black voters in that six-county area.

Pet. App. 80a. In any case, given the fact, as petitioners concede, *see* Pet. 13, that the remedial plan will not be used after the 2000 election, any issues sought to be raised in the petition are essentially moot.

II. The Evidence of Vote Dilution Was Overwhelming and Is Undisputed

Respondents, plaintiffs below, challenged house redistricting in the six-county area of Rural West Tennessee. The counties are Jackson, Hardeman, Fayette, Tipton, Lauderdale, and Haywood. Pet. App. 7a. The district court, after conducting a careful and thorough analysis under *Thornburg v. Gingles*, 478 U.S. 30 (1986), found that Plan A of Chapter 536 of the Tennessee Public Acts of 1994 violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. Pet. App. 86a. The decision was unanimously

affirmed by the court of appeals, which found that the factors showing minority vote dilution were "simply overwhelm[ing]." Pet. App. 20a, 30a.

The parties stipulated that the first two factors identified by the Court in *Thornburg v. Gingles*, 478 U.S. at 50-1, as probative of minority vote dilution had been satisfied, *i.e.*, geographic compactness and minority political cohesion. Pet. App. 6a. The district court further found, and the court of appeals affirmed, that: the white majority voted as a bloc usually to defeat the minority's candidates of choice; no black had ever been elected to the state legislature from the six-county area; there was a history of past and ongoing discrimination in voting; blacks suffered disadvantages in such areas as education, employment, and health; none of the five house districts covering the area contained a majority of black voters; and blacks in Rural West Tennessee did not have an equal opportunity to participate in the political process. Pet. App. 12a, 14a-16a. Significantly, petitioners do not contend that any of the court's factual findings are clearly erroneous.

Chief Judge Julia Smith Gibbons, to whom this case was assigned following the death of District Court Judge Jerome Turner, denied petitioners' application for a stay pending appeal after concluding that defendants had not "made a strong showing that they are likely to succeed on the merits" and that "the public interest does not favor continued denial of voting rights." Order of February 18, 2000. In addition, the court of appeals denied petitioners' petition for rehearing *en banc* without a single dissenting vote. Pet. App. 87a. Finally, Justice Stevens denied petitioners' application for a stay pending the filing of a

petition for a writ of certiorari. Pet. 7-8. In short, this case has been reviewed by numerous federal judges at the trial and appellate levels, including a Justice of this Court, and none has given any indication whatever that the decision of the lower court was problematical or that the petitioners' claims have merit.

Moreover, the Tennessee legislature itself anticipated that Plan A, because it fragmented minority voting strength, might be found to violate the Voting Rights Act. As a consequence, it enacted an alternative plan, Plan B, to be automatically implemented if Plan A "is declared invalid . . . on the grounds of dilution of minority voting strength." 1994 Tenn. Pub. Acts ch. 536, § 2. As a matter of state law, Plan B became the duly enacted legislative plan in Tennessee following the decision of the lower court. Pet. App. 20a, 85a.

The finding of the court below of vote dilution is, of course, subject to review under the clearly-erroneous standard of Rule 52(a), F.R.Civ.P. *See Thornburg v. Gingles*, 478 U.S. at 79. In light of the Court's "long-established practice not to reverse findings of fact concurred in by two lower courts unless shown to be clearly erroneous," *Neil v. Biggers*, 409 U.S. 188, 193 n.3 (1972), and given the fact that petitioners do not contend that the factual findings of the lower court are clearly erroneous, the petition for writ of certiorari should be denied.

III. This Case Presents No Issue Worthy of Certiorari

Petitioners' sole argument in support of their petition for a writ of certiorari is that the decision of the lower

court is a "prescription" for minority maximization that conflicts with *Johnson v. De Grandy*, 512 U.S. 977 (1994). Pet. 9. Notably, petitioners do *not* contend that Plan B, the plan automatically implemented by the state as a result of the decision of the lower court, is itself a "maximization" plan, that it constitutes a racial gerrymander, or that it presents any problems of any kind under the equal protection clause of the Fourteenth Amendment. Rather, petitioners acknowledge the absence of "maximization . . . in this case." Pet. 9. And as the district court found, "no arguments concerning Plan B have been heard, nor has any party alleged that Plan B constitutes an unconstitutional racial gerrymander." Pet. App. 85a-86a. If the decision of the lower court were a "prescription" for maximization, as petitioners contend, it would be a highly ineffective and anemic one, for it has produced no maximization.

In fact, the decision of the court below is not a prescription for maximization. As the court correctly concluded, "the *Gingles* preconditions operate to prevent just the sort of limitlessly small 'reverse gerrymander' whose specter the State raises here." Pet. App. 19a. *See also* Pet. App. 46a ("the three *Gingles* preconditions operate to eliminate meritless claims, and, thereby, check any concern that plaintiffs can continually narrow their challenged area until they achieve a vote dilution victory"). According to the court, a minority group that is not sufficiently large and geographically compact cannot "sustain a § 2 claim." Pet. App. 19a.

Petitioners erroneously claim that the issue unresolved by *Johnson v. De Grandy* was "whether majority-black or influence districts" should be used in examining

proportionality. Pet. 3. To the contrary, the issue the Court actually left open was whether proportionality should be judged on a statewide basis or with reference only to the areas identified in the plaintiffs' complaints where vote dilution was alleged to occur. *Johnson v. De Grandy*, 512 U.S. at 1022. The Court elected to do the latter, *id.* at 1014, but it never suggested that proportionality was to be determined by examining so-called influence districts. *Johnson v. De Grandy* is unambiguous that proportionality "links the number of majority-minority voting districts to minority members' share of the relevant population." 512 U.S. at 1014 n.11. Equating majority white districts with majority black districts in measuring proportionality, as petitioners suggest, would not only be inconsistent with *Johnson v. De Grandy* and the "opportunity . . . to elect" standard of Section 2, but would render a proportionality analysis utterly meaningless and irrational.

Petitioners also repeatedly misrepresent that the lower courts ignored statewide figures in conducting a proportionality analysis. *See* Pet. 7 (the district court "excluded . . . the entire state from the proportionality analysis"); Pet. 11 (the court of appeals "reject[ed] consideration of . . . statewide . . . numbers"). The misrepresentation can only be seen as an attempt to manufacture an issue that does not exist, for in its opinion on the merits the district court expressly held that "even on a statewide level, the creation of an additional majority-minority district would not exceed substantial proportionality." Pet. App. 80a n.24. The court of appeals, in affirming the district court, similarly took into account proportionality "[o]n a statewide basis." Pet. App. 16a-17a.

Neither Plan A nor Plan B maximizes minority voting strength, whether a statewide or area analysis is used. Under Plan A there were 99 house districts, 12 of which (12.12%) were majority black. Pet. 10. Under Plan B there are also 99 house districts, 13 of which (13.13%) are majority black. *Id.* Blacks are 16% of the total population of the state and 14.4% of the voting age population (VAP). *Id.*; Pet. App. 80a n.24. If blacks were proportionately represented on a statewide basis, and assuming that VAP rather than total population is the appropriate measure of proportionality, they would be a majority in 14.4% (as opposed to 13.13% under Plan B and 12.12% under Plan A) of the districts.

Under Plan A there were five house districts in Rural West Tennessee, all of which were majority white. Pet. App. 16a, 79a. Under Plan B there are also five house districts in Rural West Tennessee, one of which (20%) is majority black. Blacks are 34% of the total population of Rural West Tennessee and 31% of VAP. *Id.* If blacks were proportionately represented in Rural West Tennessee they would be a majority in 31% (as opposed to 20% under Plan B and 0% under Plan A) of the districts (again assuming VAP, rather than total population, is the appropriate measure of proportionality). The district court's regional and statewide analysis is presented in tabular form below.

Plan/Population	Statewide	Rural West Tennessee
Total black pop.	16%	34%
Black VAP	14.4%	31%
1994 Plan A Maj. black dist.	12 of 99 (12.12%)	0 of 5 (0%)
1994 Plan B Maj. black dist.	13 of 99 (13.13%)	1 of 5 (20%)

The district court correctly concluded that:

> the requirement of a majority-black district in that area [of Rural West Tennessee], which would make only 20% of the House districts in that area majority-black, ought not be viewed as an improper attempt to maximize majority-minority districts, but as a minimal requirement for the political equality of black voters in that six-county area.

Pet. App. 80a.[1]

A. Plaintiffs Were Not Required to Sue Metropolitan Shelby County. Petitioners, in a further and unavailing attempt to create a maximization defense, argue that the lower court was somehow obligated to include metropolitan Shelby County in its analysis. Shelby County, however, is not in Rural West Tennessee.

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[1] Even if Plan B achieved proportionality, which it does not, that would not provide a safe harbor from a Section 2 challenge. As Johnson v. De Grandy, 512 U.S. at 1020-21, provides, "[n]o single statistic provides courts with a short-cut to determine whether a set of single-member districts unlawfully dilutes minority voting strength."

The six predominantly rural counties in Rural West Tennessee are a politically cohesive, geographically compact area of the state. Pet. App. 19a. Shelby County, by contrast, is the largest urban county in the state. It has a population of 826,000 people, more than ten times the size of the largest county in Rural West Tennessee. Revised Stipulation of Facts, Addendum 7, pp. 1-9. The black population in Shelby County is also concentrated in inner-city Memphis and is largely set off from Rural West Tennessee by a "buffer zone" of white suburbs. As the lower court found, "the African-American populations in these two areas are not likely to be particularly cohesive." Pet. App. 19a.

Blacks in Rural West Tennessee share economic disadvantages; they "have about half the per capita income of whites and three times the poverty level." *RWTAAAC v. McWherter*, 836 F.Supp. 447, 459 (W.D.Tenn. 1993).[2] They also have a common and special history of discrimination, including discrimination in voting. The strongest examples of intimidation and discrimination against black voters cited by the lower court were those that took place in Rural West Tennessee. *Id.* at 461. Most important, in Rural West Tennessee "black candidates have not been elected in the past . . . [and] are not in a position to enjoy the benefits of incumbency and political sponsorship which comes with being part of the political mainstream." *Id.*

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[2] The district court here incorporated the findings of fact in the prior decisions of the court involving senate redistricting in Tennessee. *See* Pet. App. 56a.

Given the findings of the court, there is nothing arbitrary or irrational in treating Rural West Tennessee as an area for purposes of a Section 2 vote dilution challenge. As the court of appeals concluded, "we note that the region selected by the plaintiffs in this case is a sensible one – indeed more sensible than the seven-county area including Shelby County urged by the state." Pet. App. 19a.

Petitioners erroneously claim that plaintiffs in their Second Amended Complaint included Shelby County in their challenge to redistricting in Rural West Tennessee and "changed their position by excluding Shelby County" only after being essentially invited to do so by the district court. Pet. 6. To the contrary, the Second Amended Complaint made it clear from the beginning that plaintiffs challenged redistricting in West Tennessee *and* in Rural West Tennessee as a separate, distinct area. Second Amended Complaint, paras. 37, 40, 45, 46. As the district court found, plaintiffs elected to pursue *only* their claim involving Rural West Tennessee, a decision which the court acknowledged was "a legitimate voluntary dismissal of plaintiffs' statewide and Shelby County vote dilution claims." Pet. App. 46a.[3]

Plaintiffs have no quarrel with and do not challenge house redistricting in Shelby County. It is elemental that parties, within the limits of Rules 8 and 11, F.R.Civ.P., are free to frame their pleadings as they wish. Defendants

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[3] Plaintiffs' decision to pursue only their Rural West Tennessee claim was based on their assessment that they were unlikely to prevail on a Section 2 challenge to redistricting in Shelby County.

cannot force plaintiffs to bring claims different from the ones they have elected to bring, nor can they force a court to adjudicate claims that were not brought. *See* 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1286, at 559 (2d ed. 1990) ("the liberal construction accorded a pleading under Rule 8(f) does not require the courts to fabricate a claim that a plaintiff has not spelled out in his pleadings").

In addition, the adjudication of a claim not brought or maintained by a party would constitute a purely advisory opinion beyond the power of the court to grant. *See Muskrat v. United States*, 219 U.S. 346, 354 (1911); *C. & S. Airlines v. Waterman Corp.*, 333 U.S. 103, 113-14 (1948). As the Court held in *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947), " 'concrete legal issues, presented in actual cases, not abstractions,' are requisite" for adjudication by a federal court.

Petitioners' argument that plaintiffs could not limit their challenge to house redistricting in Rural West Tennessee, but were obligated to sue or include a huge urban county, is not only improbable but is also without precedent. *Thornburg v. Gingles* explicitly recognized the right of plaintiffs to limit their Section 2 claims to those areas of a state in which vote dilution was alleged to occur. The plaintiffs in that case challenged only seven districts in the state's legislative plan, six of which were held to violate Section 2. *Gingles*, 478 U.S. at 35, 77.[4]

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[4] The right of plaintiffs to bring claims against specific areas where minority voting strength was claimed to be diluted has been routinely acknowledged by the lower courts. In NAACP v. Austin, 857 F.Supp. 560, 569 n.5 (E.D.Mich. 1994), for

The Court also made it clear in *Shaw v. Hunt*, 517 U.S. 899 (1996), that vote dilution is not remedied in one area of a state merely because minority voting strength is not diluted in some other area. *Id.* at 917 ("[t]he vote dilution suffered by these persons are not remedied by creating a safe majority-black district somewhere else in the State"). As the district court here held, relying upon *Shaw v. Hunt*, "the presence or absence of vote dilution in a particular region of a state cannot be determined by looking to the statistics of another region of the same state." Pet. App. 42a. And as the court of appeals held, accepting the state's argument "would require us to trade the § 2 rights of individual African-Americans in rural west Tennessee against those of African-American groups elsewhere in the State." Pet. App. 18a-19a. The fact that minority voting strength may not be diluted in Shelby County cannot, therefore, stand for the proposition that black voting strength is not diluted in Rural West Tennessee, where there are no majority black house districts and no black house members.

In this case, the obvious reason petitioners want Shelby County included in a proportionality analysis is

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example, plaintiffs limited their challenge to Wayne and Oakland Counties. In Marylanders for Fair Representation, Inc. v. Shaefer, 849 F.Supp. 1022, 1047 (D.Md. 1994) (three-judge court), the court rejected a vote dilution challenge in Baltimore, but concluded that the state's plan diluted the voting strength of blacks residing in the Eastern Shore and required the creation of a majority black district in that area of the state. According to the court, "there has never been a black State Senator or Delegate from any of the nine counties of the Eastern Shore," and "[t]he State's recently enacted redistricting plan promises more of the same." 849 F.Supp. at 1064.

because it masks or hides the dilution that occurs in Rural West Tennessee. As the district court concluded, "when defendants attempt to add another county to plaintiffs' challenged region, as in the instant case, over-proportionality in the added county may again conceal dilution in the plaintiffs' challenged region." Pet. App. 40a. The court below did not err in its proportionality analysis or fail to comply with the decisions of this Court.

IV. Any Issues Sought to Be Raised in the Petition Are Moot

Petitioners concede that "plan B will not . . . be used after the 2000 election." Pet. 13. Elections held in 2002 and subsequent years will be governed by a new plan based on the 2000 census. Under the circumstances, any decision of this Court concerning the legality of Plan B, which would necessarily come after the November 2000 elections, would be entirely advisory. Indeed, petitioners urge the Court to grant certiorari, not to resolve any continuing dispute among the parties, but to advise Tennessee and other states on how to "frame and defend their post-2000 redistricting plans." Pet. 13.[5]

This Court has repeatedly held that "Article III . . . confines [federal courts] to resolving 'real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character.' " *Lewis v. Continental*

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[5] Since Tennessee is not covered by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, this case does not present a situation where the existing plan will serve as the baseline for evaluating the 2002 plan for purposes of preclearance. *Cf.* Reno v. Bossier Parish School Bd., 120 S.Ct. 866, 871 (2000).

Bank Corp., 494 U.S. 472, 478 (1990) (quoting *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 241 (1937)). This case no longer has the aspect of a "real and substantial" controversy. Accordingly, the petition for a writ of certiorari should be denied as moot.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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